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No. 99-826

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

COMMONWEALTH OF PENNSYLVANIA, *Petitioner*,

v.

DAVID CHMIEL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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(FORMER CAPITAL CASE)

QUESTIONS PRESENTED

1. Does the prosecution's use of the respondent's former lawyer's testimony to impeach the respondent's contradictory testimony at his new trial violate the respondent's Sixth Amendment right to counsel where the attorney-client privilege has previously been waived by the respondent's prior attack on former trial counsel's competence?

2. Does the prosecution's use of the respondent's former lawyer's testimony to impeach the respondent's contradictory testimony at his new trial violate the respondent's Fifth Amendment right to be free from compelled self-incrimination where the attorney-client privilege has previously been waived by the respondent's prior attack on former trial counsel's competence?

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INTEREST OF AMICUS CURIAE

All of the states have non-constitutional evidentiary privileges, such as the attorney-client privilege, that are subject to waiver. The question of whether unprivileged, or once privileged, material may be admissible evidence pursuant to state law, but nonetheless inadmissible on federal Constitutional grounds, is therefore of significant importance and concern to amicus.[1]

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1. This brief is submitted in support of petitioner by amicus in accordance with Rules 37.2 and 37.5 of the Rules of the Supreme Court of the United States.

SUMMARY OF THE ARGUMENT

Courts have acknowledged a relationship between the attorney-client privilege, an exclusionary rule of evidence, and the Sixth Amendment right to effective assistance of counsel, a protection against fundamentally unfair trials. The guarantee that attorney-client communications remain confidential allows a criminal defendant to be open with counsel, helping the attorney to effectively represent the defendant, within the meaning of the Sixth Amendment. *See, e.g., United States v. Zolin*, 491 U.S. 554, 562 (1989). For this reason, the possibility exists that government intrusion into privileged attorney-client communications could violate a defendant's Constitutional right to the effective assistance of counsel. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 554 (1977); *Shillinger v. Haworth*, 70 F.3d 1132, 1138 (10th Cir. 1995).

However, once the evidentiary protection of the privilege has been completely and voluntarily waived and ceases to exist, the relationship between the attorney-client privilege and the Sixth Amendment should be deemed terminated. This Court and others have recognized that the relationship between these two doctrines reflects a concern for protecting privileged, rather than otherwise unprivileged, confidences. *See Weatherford*, 429 U.S. at 554; *Shillinger*, 70 F.3d at 1138. Voluntary waiver of the privilege, and subsequent disclosure of once confidential communications, provides a clear indication that confidentiality with respect to the disclosed communications is no longer necessary to ensure constitutionally effective representation. As such, the admission into evidence against a defendant of formerly confidential communications cannot logically even implicate the Sixth Amendment right to effective assistance of counsel. The Pennsylvania Supreme Court held to the contrary. This Court should resolve this important issue.

Further, the Pennsylvania Supreme Court failed to consider the actual facts of this case with respect to its holding. The court held that the admission of formerly privileged attorney-client communications against the client will create a "chilling effect" so that defendants do not feel free to be open and honest with their attorneys. As a result, a defendant is apparently per se deprived of the Sixth Amendment right to effective assistance of counsel. *Commonwealth v. Chmiel*, 738 A.2d 406, 423 (1999). Here, however, the communications that were at issue were false alibi stories provided by Chmiel to his attorney. The attorney acted properly in refusing to present any false evidence at Chmiel's first trial. *Nix v. Whiteside*, 457 U.S. 157, 174-75 (1986). Thus, if Chmiel's knowledge that formerly privileged attorney-client communications could be used against him would have had any "chilling effect" in this case, the effect necessarily would have been to curtail Chmiel's willingness to provide false stories to his lawyer and his expectation that those falsehoods would be used to defend him. The Sixth Amendment does not protect against this type of "chilling effect." The petition for writ of certiorari should therefore be granted.

ARGUMENT

I.

The Sixth Amendment Right To Effective Assistance Of Counsel Is Not Violated By The Admission Into Evidence Against A Defendant Of Certain Attorney-Client Communications To Which The Defendant Has Voluntarily Waived The Attorney-Client Privilege

The Pennsylvania Supreme Court's holding in this case was that, if an attorney could disclose once privileged attorney-client communications by testifying against the client/defendant in a judicial proceeding after the client voluntarily waived the privilege, there would be an unconstitutional "chilling effect" on the attorney-client relationship, in terms of the defendant feeling free to be open with his lawyer. *Chmiel*, 738 A.2d at 423. In other words, if a defendant knew that his attorney could testify against him at some proceeding, and could reveal formerly protected communications, there would be a chilling effect on the client's willingness to communicate freely and openly with the lawyer, which violates the Sixth Amendment right to effective assistance of counsel. Thus, even though the formerly privileged communications were admissible under state law, the Constitution was nevertheless violated. *See id.* This holding, which is inconsistent with existing federal authority, raises an important question of federal constitutional law that should be settled by this Court.

A. The Admission Into Evidence Of Unprivileged Attorney-Client Communications Against The Client/Defendant Does Not Violate The Sixth Amendment Right To Effective Assistance Of Counsel

The Pennsylvania Supreme Court's holding in this case was premised on its determination that a relationship existed between the Sixth Amendment right to effective assistance of counsel and the evidentiary attorney-client privilege. Other courts, including this Court, have likewise acknowledged the existence of this relationship. *See, e.g.*, *Weatherford*, 429 U.S. at 554. In this regard, the attorney-client privilege's guarantee of confidentiality, which allows a client to discuss matters freely and openly with his or her attorney, helps to provide a criminal defendant with the effective assistance of counsel guaranteed by the Constitution. *See, e.g.*, *Zolin*, 491 U.S. at 562 (criminal defendants must "be free to make full disclosure to their attorneys . . . in order that the client may obtain the aid of persons having knowledge of the law and skilled in its practice") (internal citations and quotations omitted). Because of this relationship between the evidentiary privilege and the constitutional guarantee, which has even been described as "fundamentally complimentary," *United States v. Rainone*, 32 F.3d 1203, 1206 (7th Cir. 1994), it is conceivable that "under some circumstances a defendant's Sixth Amendment rights may be violated by the state's intrusion into the attorney-client relationship." *Shillinger*, 70 F.3d at 1138. In other words, there could be Sixth Amendment implications if the government obtained and used against a defendant information protected by the attorney-client privilege. *See Weatherford*, 429 U.S. at 554.

The Pennsylvania Supreme Court strays from the reasoning relied upon by the other courts that have examined this issue. The foregoing authorities all contemplate governmental intrusion into attorney-client

communications, and use of those communications to the defendant's detriment, but only when the attorney client privilege is *still in effect*. Thus, the possibility of a Sixth Amendment violation exists only if the government intrudes into *privileged* and protected attorney-client communications. If such privileged communications could actually be used against a criminal defendant, the resulting "chilling effect" on attorney-client communications feared by the Pennsylvania Supreme Court might be a distinct possibility. In this case, though, under Pennsylvania law, Chmiel's allegations of incompetent counsel constituted a *complete and voluntary waiver* of the attorney-client privilege as to any communications relevant to that charge.[2] *Chmiel*, 738 A.2d at 414. In other words, pursuant to state law, Chmiel was deemed to have voluntarily disclosed communications that he could have kept confidential, thus terminating the privileged nature of the communications that other courts appear to have deemed critical to any Sixth Amendment analysis.

Although it is a doctrine of great historical significance and importance, the "attorney-client privilege, like most other privileges, is an evidentiary privilege--it protects against the compelled disclosure in court, or in court sanctioned discovery, of privileged communications." *Wharton*, 127 F.3d at 1205. Phrased another way, "[t]he attorney-client privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of

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2. The same is true in California, many other states, and many federal jurisdictions as well. *See, e.g.*, *In re Gray*, 123 Cal.App.3d 614 (1981) (California); *Joseph v. State*, 3 S.W.3d 627 (1999) (Texas); *Eldridge v. United States*, 618 A.2d 690 (1992) (District of Columbia); *State v. Thomas*, 599 A.2d 1171 (1992) (Maryland); *Commonwealth v. Woodberry*, 530 N.E.2d 1260 (1988) (Massachusetts); *Harris v. Commonwealth*, 688 S.W.2d 338 (1984) (Kentucky); *Jackson v. State*, 540 S.W.2d 607 (1976) (Missouri); *see also Wharton v. Calderon*, 127 F.3d 1201 (9th Cir. 1997); *United States v. Ballard*, 779 F.2d 287 (5th Cir. 1986); *Tasby v. United States*, 504 F.2d 332 (8th Cir. 1974).

certain confidential communications between a client and a lawyer." *United States v. Rogers*, 751 F.2d 1074, 1077 (9th Cir. 1985); *see also Commonwealth v. Goldblum*, 447 A.2d 234, 464 (Pa. 1982) ("Between an attorney and client the privilege is confined to confidential communications, and does not exist as to those communications which to subserve the interest of the client [were] publicly disclosed by direction of the client himself. . . ." (internal quotations omitted)). In short, the attorney-client privilege makes inadmissible against the client/defendant any attorney-client communications to which the privilege applies.

As to unprivileged attorney-client communications, however, there seems to be little question about their constitutional admissibility against a defendant. For example, a defendant can waive the attorney-client privilege by voluntarily disclosing attorney-client communications in the presence of, or specifically to, a third party unaffiliated with the defense team. *See United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982); *In re Sealed Case*, 676 F.2d 793, 808-09 (D.C. Cir. 1982); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972). Amicus have not located even a single published state supreme court or federal court case holding that the Constitution was violated where communications as to which a defendant voluntarily waived the attorney-client privilege by disclosing the communications in the presence of or to such a third party, were subsequently used against the defendant in court.[3]

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3. As another example, communications by a client/defendant to an attorney concerning the defendant's intent to commit fraud or a criminal act in the future are considered outside the scope of the attorney-client privilege, and are therefore unprotected and admissible attorney-client communications. *See, e.g., Zolin*, 491 U.S. at 562-63; *see also Clark v. United States*, 289 U.S. 1, 15 (1933). Amicus have found no authority standing for the proposition that the admission against a defendant of such unprivileged communications violates the

Again, there is no question in this case, under Pennsylvania law, that Chmiel is deemed to have voluntarily waived the attorney-client privilege with respect to certain communications when he challenged his trial attorney's competence following his conviction. *Chmiel*, 738 A.2d at 414. It is also not in dispute that the relevant attorney-client communications were admissible against Chmiel under state law. *Id.*, at 415-20. Nevertheless, the Pennsylvania Supreme Court found Chmiel's voluntary waiver of the attorney-client privilege in this case operated differently, and somehow failed to sever the relationship between the privilege and the Sixth Amendment right to effective assistance of counsel.

As the United States Court of Appeals for the Ninth Circuit has aptly observed, "the attorney-client privilege simply does not extend . . . to non-compelled, voluntary, out-of-court [disclosures], any more than it does to an after-dinner conversation." *Wharton*, 127 F.3d at 1205. In this regard, whether attorney-client communications fall outside of the attorney-client privilege because the defendant voluntarily discloses those communications to a third party for no particular reason whatsoever, or specifically because he is challenging his trial attorney's competence, the communications are still equally unprivileged and constitutionally admissible. If a communication subject to the attorney-client privilege becomes constitutionally admissible against a defendant because he has waived the privilege by disclosing the communication for no apparent reason at all, amicus fail to see how the result can possibly be different simply based on the specific reason for the disclosure.

In the end, an unprivileged communication is an unprivileged communication. If one type of such attorney-client communication is admissible without offending the

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Constitution in any way.

Constitution, there is no rational reason why the result should be different for any other unprivileged attorney-client communication, simply because the motive for disclosure might have been different. Yet, the Pennsylvania Supreme Court has drawn a distinction in this case. In light of the authorities discussed above, that distinction appears to be without legal support. In any event, the state supreme court's decision clearly involved an important and unsettled constitutional question that should now be resolved by this Court.

B. The Sixth Amendment Does Not Provide An Expectation That Counsel Will Present False Evidence, Or Suborn Perjury, In Providing Effective Representation For A Client

The Pennsylvania Supreme Court's holding was also erroneous when applied to the facts of this case. The state court was concerned that there would be a "chilling effect" on the Sixth Amendment right to effective assistance of counsel if once privileged attorney-client communications could be used against the client. *Chmiel*, 738 A.2d at 423. In other words, that court feared criminal defendants may be dissuaded from being open and honest with their attorneys if they knew the attorney could testify against them and disclose attorney-client communications in the process. *Id.*

Even if legally accurate in other circumstances or situations, which amicus doubt, such a rule has no applicability here. The attorney-client communications at issue in this case were the false alibi stories Chmiel conveyed to his attorney. Chmiel had no protectable expectation under the Constitution that his attorney would knowingly use perjured testimony or evidence otherwise known to be false in defending him at trial. *Nix*, 457 U.S. at 174-75. Thus, if Chmiel's willingness to partake in full disclosure with his attorney would have been "chilled"

here, had the rule announced in this case already been in existence, he would only have been "chilled" from providing his lawyer with false evidence.[4] "[N]either the Sixth Amendment right [to the effective assistance of counsel] nor the attorney-client privilege gives a criminal defendant the right to carry out through his counsel an unlawful course of conduct." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992).

In this case, Chmiel was charged with the stabbing deaths of three individuals. At trial, he wanted to testify about his alibi, and wanted his attorney, one Kennedy, to present an alibi defense. During the course of their attorney-client relationship, Chmiel had provided Kennedy with multiple, dissimilar versions of the events leading up to the murders. Chmiel's first story was that he was present at the scene when the murders occurred, but just "to case the joint." While doing so, Chmiel saw an individual he believed was his brother, Marty, running from the home of the murdered victims. *Chmiel*, 738 A.2d at 410. Five months after providing that account, Chmiel changed his story, claiming he was nowhere near the scene when the murders occurred, and had a witness who would testify in that regard. Chmiel's third account, which conveniently arose the day after Chmiel's brother testified against him at the preliminary hearing, was that Marty confessed to being the murderer. *Id.*, at 411-13. Kennedy discouraged Chmiel from testifying, and declined

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4. The Pennsylvania Supreme Court's holding here cannot escape the irony that even after the prosecution announced its pretrial intention to impeach Chmiel with his formerly privileged statements, should he take the stand and rely on the alibi defense, Chmiel was *not* dissuaded from providing his second lawyer with and pursuing his highly suspect, if not outright false, alibi defense. Thus, there was clearly no "chilling effect" on attorney-client communications in this case.

to present any alibi defense. Chmiel was convicted and sentenced to death. *Id.*, at 408-09.

Following his conviction, Chmiel filed a petition in the trial court alleging that he had been denied effective representation because counsel discouraged him from testifying, failed to investigate or present alibi evidence, and failed to request an accomplice jury instruction. An evidentiary hearing was held with respect to these claims. *Chmiel*, 738 A.2d at 409.

Under Pennsylvania law, "a party who attacks the competence of his or her counsel cannot rely on the attorney-client privilege to prevent counsel from responding to such attack." *Id.*, at 414. "In effect, the client's attack on the competence of counsel serves as a waiver of the privilege as to the matter at issue." *Id.* As a result, attorney Kennedy testified at the evidentiary hearing. As to Chmiel's claim that Kennedy should have allowed him to testify on his own behalf, Kennedy stated that he discouraged such testimony because Chmiel "had told him more than one version of the events at issue," and "he risked suborning perjury if he allowed his client to testify." *Id.*, at 415. As to the reason Kennedy did not investigate possible alibi witnesses or defenses, he explained "that his client had rendered the search for such witnesses more difficult by giving more than one version of his whereabouts on the night in question." *Id.* Both the trial court, and state supreme court on review, denied relief as to the foregoing claims of constitutionally deficient representation. However, the Pennsylvania Supreme Court ultimately granted relief, and a new trial, for counsel's failure to request the accomplice instruction.[5] *Id.*, at 409.

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5. The Pennsylvania Supreme Court found a complete and voluntary waiver of the attorney-client privilege despite the fact relief was ultimately granted on a different claim of incompetent counsel. *Id.*, at 414.

At his retrial, represented by a new attorney, Chmiel testified on his own behalf, and presented an alibi defense in the form of the second story he had told Kennedy. *Chmiel*, 738 A.2d at 409-10. To impeach his testimony, the prosecution used attorney Kennedy's testimony from the earlier evidentiary hearing, which was comprised of attorney-client communications to which Chmiel had voluntarily waived his attorney-client privilege by attacking Kennedy's competence.[6] *Id.*, at 410-13. Chmiel was again convicted and sentenced to death.

On appeal to the Pennsylvania Supreme Court, Chmiel argued, among other things, that the use of Kennedy's evidentiary hearing disclosures denied him his Sixth Amendment right to effective assistance of counsel, as well as his Fifth Amendment privilege against self-incrimination. *Id.*, at 420-24. The Pennsylvania Supreme Court agreed.

The court began by observing that "[t]he purpose of the [attorney-client] privilege is not to further the fact-finding process, but to foster a confidence between attorney and client that will lead to a trusting and open dialogue." *Id.*, at 422-23. The court cited additional authorities, all generally standing for the proposition that the attorney-client privilege serves the critical function of guaranteeing, absent a waiver of the privilege, that the matters discussed by attorney and client will remain confidential, so that the client will freely and openly discuss matters with his lawyer, allowing the lawyer to present the best defense legally available. *See id.* Thus, according to the Pennsylvania Supreme Court, if an attorney could testify against a client, and such testimony was based on communications once covered by the attorney-client privilege, the result would be "a chilling effect on defendants' exercise of their right to the effective

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6. Attorney Kennedy died prior to Chmiel's retrial. *Chmiel*, 738 A.2d at 423, n.11.

assistance of counsel." *Chmiel*, 738 A.2d at 423. As the court continued,

> Knowing of the possibility that his counsel may ultimately be required to testify against him, a defendant may decide that counsel cannot be trusted with the most damaging information concerning the case; or he may decide not to challenge counsel's effectiveness, fearing that his ability to mount a successful defense at a second trial has been fatally undermined by the admissibility of his communications to prior counsel. The fundamental unfairness of requiring a defendant to choose either of those options is illustrated by the present case: the situation that such a choice seeks to avoid--the admission at a second trial of prior counsel's evidentiary hearing testimony--has occurred precisely because prior counsel was shown to have been ineffective.

Id. As a result, the Pennsylvania Supreme Court held that using attorney Kennedy's evidentiary hearing testimony to impeach Chmiel at the criminal retrial, while admissible under state evidentiary law, violated Chmiel's Sixth Amendment right to the effective assistance of counsel. *Id.*, at 424. This holding was entirely unsupported by the facts of this case.

The Sixth Amendment to the United States Constitution guarantees the criminal defendant the right "to have the Assistance of Counsel for his defense." U.S. Const., Amend. VI. This Court has made clear that the right to counsel is more than a guarantee "[t]hat a person who happens to be a lawyer is present at trial alongside the accused. . . ." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Instead, the right to the assistance of counsel means "'the right to the effective assistance of counsel.'"

Id., at 686, *quoting McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

In defining "effective assistance," this Court observed that "specific guidelines are not appropriate." *Strickland*, 466 U.S. at 688. In order to obtain relief based on allegations that counsel was ineffective, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* Thus, the performance inquiry to a claim of incompetent representation is necessarily a case-specific analysis where the reviewing court must determine "whether counsel's assistance was reasonable considering all the circumstances." *Id.*

Since establishing the foregoing test in *Strickland*, this Court has had various opportunities to apply it to specific factual circumstances. One such case involved the question of whether a lawyer deprived a client of effective representation by failing to present perjured testimony, or evidence otherwise known by the attorney to be false. *Nix*, 457 U.S. 157. There, this Court held, in no uncertain terms, that an attorney who refuses to defend a client through the use of perjured testimony or evidence known to be false, does not provide constitutionally deficient representation. *Id.*, at 174-75. As the *Nix* Court stated, an attorney's duty of loyalty, and obligation to defend,

> is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.

Id., at 166. The *Nix* holding illustrates that in this case, the Pennsylvania Supreme Court has misconstrued the

scope and protections afforded by the Sixth Amendment right to counsel.

The attorney-client communications at issue in this case were those relating to the various alibi stories provided by Chmiel to attorney Kennedy, most of which, if not all, were clearly untrue. As discussed previously, an attorney cannot be constitutionally ineffective for failing to use at trial evidence known to be false. *Nix*, 457 U.S. at 174-75. Thus, Chmiel had absolutely no lawful expectation, under the Sixth Amendment's guarantee of effective assistance of counsel, that either Kennedy or his subsequent lawyer on retrial would utilize at trial the obvious falsehoods provided by Chmiel.

Moreover, because the law here is indisputable, Chmiel likewise knew, or at least should have known, that his attack on attorney Kennedy's competence, as to the failure to use any false alibi evidence, in the form of Chmiel's own testimony or otherwise, could not possibly have been successful (and it was not). Hence, the only possible "chilling effect" on the attorney-client relationship, had Chmiel known that Kennedy's evidentiary hearing testimony could be used against him at retrial, would have been on Chmiel's willingness to provide his attorney with false evidence and untruths in the first place. This type of "chilling effect" cannot possibly violate the Sixth Amendment.

This Court has stated that "the [attorney client] privilege is intended to encourage *full and frank* communication between attorneys and their clients and thereby promote broader public interest in the observance of law and the administration of justice." *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2084 (1998) (emphasis added). The Pennsylvania Supreme Court explicitly acknowledged that very notion in this case. *Chmiel*, 738 A.2d at 422-23 ("[t]he purpose of the [attorney-client] privilege is . . . to foster a confidence between attorney and client that will lead to a trusting and open dialogue").

Thus, that court was clearly aware that the attorney-client privilege does not exist so that defendants can feel free to provide their attorneys with false evidence. Nevertheless, the effect of the state supreme court's decision in this case results in an unprecedented expansion of the Sixth Amendment right to effective assistance of counsel to include a defendant's right to lie to his attorney, to potentially lie in court, and yet remain free from being impeached by the attorney, even after attacking the attorney's competence for failing to use the untruths as part of the defense during trial. Such a rule serves neither the "public interest" nor the "administration of justice." To the contrary, this Court has made it clear that penalizing a defendant for testifying falsely at trial does not offend the Constitution, and indeed promotes the proper administration of justice. *United States v. Dunnigan*, 507 U.S. 87, 96 (1993).

The prosecution's use of attorney Kennedy's evidentiary hearing testimony to impeach Chmiel during retrial did not violate the Sixth Amendment, and would not create any type of constitutionally prohibited chilling effect on attorney-client relations. The petition for writ of certiorari should therefore be granted.

II.

The Prosecution's Impeachment Of Chmiel At Retrial With Attorney Kennedy's Evidentiary Hearing Testimony, Which Was Comprised Of Attorney-Client Communications To Which Chmiel Had Voluntarily Waived The Attorney-Client Privilege, Did Not Violate, Nor Even Implicate, Chmiel's Fifth Amendment Privilege Against Self-Incrimination

The Pennsylvania Supreme Court also held that the prosecution's impeachment of Chmiel at retrial with attorney Kennedy's evidentiary hearing testimony violated Chmiel's Fifth Amendment privilege to remain free from compelled self incrimination. *Chmiel*, 738 A.2d at 424. This ruling was likewise erroneous.

In pertinent part, the Fifth Amendment provides that, "No person . . . shall be *compelled* in any criminal case to be a witness against himself. . . ." U.S. Const., Amend. V. Here, Chmiel was not *compelled* to do anything. Specifically, he was not compelled to provide his attorney with multiple false stories concerning his whereabouts at the time the murders occurred. He was likewise not compelled to challenge his attorney's competence for failing to use those false stories to unlawfully concoct an alibi defense for Chmiel at his first trial. Finally, he was not compelled at his retrial to use the alibi defense that attorney Kennedy had lawfully refused to present at the first trial, especially since he was forewarned by the prosecution that he would be subject to impeachment with his formerly privileged statements. Chmiel did all of these things voluntarily. The voluntary nature of Chmiel's actions and disclosures demonstrates that the Fifth Amendment, as applied to the states through the Fourteenth Amendment, is not in any way violated here.

See, e.g., Ohio Adult Parole Authority v. Woodard, 118 S. Ct. 1244, 1252-53 (1998).

As a consequence of Chmiel's voluntary actions, attorney Kennedy was permitted under state law to reveal once privileged attorney-client communications in responding to the frivolous allegations of incompetent counsel. The state prosecutor was likewise permitted, under Pennsylvania law, to impeach Chmiel at retrial with that testimony. *Chmiel*, 738 A.2d at 415-20. When Chmiel waived his attorney-client privilege to challenge Kennedy's competence, the once confidential nature of the pertinent communications was waived for all times. *See, e.g., Genentech, Inc. v. United States International Trade Commission*, 122 F.3d 1409, 1416-17 (Fed. Cir. 1997); *see also* Edna S. Epstein & Michael M. Martin, The Attorney-Client Privilege and the Work-Product Doctrine, 76 (2d ed. 1988) ("Once an express or implicit waiver has occurred, the privilege is generally treated as relinquished for all purposes and in all circumstances thereafter").

With that evidentiary privilege gone, there was no longer anything unique or special about the relationship between Chmiel and Kennedy as to those disclosed communications. Kennedy was just like any other person to whom Chmiel may have voluntarily disclosed information. When Kennedy testified at Chmiel's retrial in that capacity, he did so just as any other witness would have.[7] Amicus have found no legal authority stating that a criminal defendant's Fifth Amendment right against compelled self-incrimination is violated when a prosecution witness reveals in court unprivileged communications of the defendant. The Pennsylvania Supreme Court's holding in this respect was therefore

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7. Again, Kennedy did not personally testify at Chmiel's retrial, as he had passed away. A transcript of his evidentiary hearing testimony was read for the jury. *Chmiel*, 738 A.2d at 423, n.11.

erroneous. The petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, amicus respectfully request that this Court grant the petition for writ of certiorari.

Dated: December 13, 1999.

Respectfully submitted,

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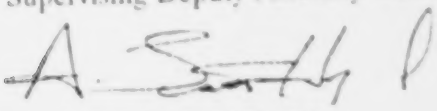

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